

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-1347

B
P/C

In the United States Court of Appeals for the Second Circuit

No. 74-1347

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANCESCO CORDARO,

Plaintiff-Appellant,

- against -

RICHARD H. LUSARDI and the UNITED STATES
OF AMERICA,

72 Civ. 3644
(MIG)

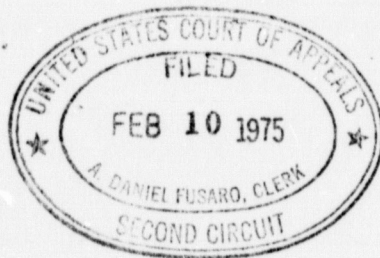
Defendants and Third-
Party Plaintiffs,

- against -

CITY OF POUGHKEEPSIE,

Third-Party Defendant.

BRIEF FOR THIRD-PARTY DEFENDANT



ROBERT B. DIETZ
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ARGUMENT

POINT ONE

THE DISTRICT COURT VERDICT WAS COMPLETELY IN ACCORD WITH THE EVIDENCE. THE COURT FINDINGS WERE BASED ON A FULL HEARING OF THE APPLICABLE FACTS AND OF THE LAW PERTINENT THERETO.

A comprehensive reading of the trial testimony indicates that sufficient facts were testified to by which a judge sitting without a jury could properly reach the conclusion that the evidence was legally sufficient and of proper probative value justifying the instant judgment now on appeal.

Much of what is set forth in the brief of plaintiff-appellant constitutes a characterization and paraphrasing of testimony by counsel which testimony admittedly was unclear at times but which is quite clear after carefully reviewing and reading the entire transcript of the trial minutes herein.

Plaintiff-appellant concedes quite correctly that the plaintiff must exercise due care to recover anything. A reading of the entire transcript herein leads one to the inescapable conclusion that due care was not exercised by the plaintiff. Plaintiff was familiar with the intersection where the accident occurred having traveled through it virtually every day, knew it was a dangerous intersection, and lived nearby, but admitted

under oath that he did not slow down his vehicle as he entered that intersection.

POINT TWO

THE TESTIMONY OF THE PLAINTIFF, EVEN IF HE DID HAVE DIFFICULTIES WITH THE ENGLISH LANGUAGE, INDICATES THAT HE UNDERSTOOD THE QUESTIONS ASKED, ATTEMPTED TO GIVE ANSWERS TO THE BEST OF HIS ABILITY, AND DID GIVE ANSWERS TO THE BEST OF HIS ABILITY UNDER OATH.

It would serve little purpose to highlight out of context certain answers the plaintiff gave to questions propounded upon the trial of this action. An entire reading of the transcript indicates that the plaintiff understood the questions and attempted to articulate, to the best of his ability, his respective answers. The answers speak for themselves and solidify the position of the District Court Judge who concluded that the plaintiff was contributorily negligent.

POINT THREE

PLAINTIFF'S BURDEN OF PROOF AS TO HIS FREEDOM FROM CONTRIBUTORY NEGLIGENCE WAS NOT REDUCED, AS A MATTER OF LAW, TO THE VANISHING POINT.

The brief now before this Court on behalf of plaintiff-appellant incorrectly states at page 12 thereof that "there is a

general softening of the rigidities of the doctrine of contributory negligence in New York." The only case the appellant relies upon for its position is the Court of Appeals' case of Wartels v. County Asphalt, 29 N.Y. 2d 372. While Wartels is an important decision, it is not only clearly distinguishable from the case at bar but has no application thereto whatsoever.

In Wartels, the plaintiff, occasioned by brain damage sustained as a result of the very accident for which that lawsuit was commenced, was at a complete loss of recollection as to the facts of that accident and of the events preceding it. Indeed, it appears clear that in Wartels, there was no direct testimony as to the operation of the motor vehicle by the plaintiff. Instead, inferences favorable to the plaintiff were drawn by the jury which inferences the Court of Appeals found to be correctly drawn.

In the instant case, presently on appeal, the plaintiff-appellant was ready, willing, and able to testify and actually did testify as to his operation of the motor vehicle involved in the automobile accident. In fact, it was on his testimony that the plaintiff put in his entire case. There was no evidence that the plaintiff had sustained any injury by way of brain damage or otherwise which resulted in a complete loss of recollection with regard to facts concerning the accident. In fact, the plaintiff seemed to recall the very date of the accident with some degree of detail as

well as the events before, during, and after his accident.

It must be emphasized, as a matter of law, that the decision of the Court of Appeals in Wartels is a decision that came into play as a result of some very unusual and distinctive facts. The Court of Appeals found that negligence had been established in an excessive degree after considering a variety of much more complicated and persuasive facts than are before the United States Court of Appeals for the Second Circuit in the instant case. As a matter of fact, the Court of Appeals made it quite clear that "the determination of the issue of contributory negligence is, of course, almost exclusively a jury function." Wartels v. County Asphalt, Inc., Supra, at page 378. In Cordaro, the operative facts were such that as a matter of law the issue of contributory negligence was not reduced to the vanishing point. It was, instead, a question for the proper determination of the District Court Judge after considering and evaluating all the facts and exhibits.

CONCLUSION

The judgment entered on January 10, 1974 by the United

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Defendants and Third-
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- against -

CITY OF POUGHKEEPSIE,

Third-Party Defendant.

STATE OF NEW YORK)
COUNTY OF DUTCHESS) ss.:

NANCY LEVINE, being duly sworn deposes and says:
I am not a party to the action, am over 18 years of age and
reside at Poughkeepsie, New York. On February 7th, 1975, I
served two (2) copies of the brief for third-party defendant,
City of Poughkeepsie, to each of the following attorneys by
mailing the same in a sealed envelope prepaid thereon, in a
post-office or official depository of the U.S. Postal Service
within the State of New York, addressed to the last known
addresses of the addressee indicated below:

GERALD A. ROSENBERG, ESQ.
Assistant U.S. Attorney
U.S. Courthouse
Foley Square
New York, New York 10007

MARSHALL L. BRENNER, ESQ.
35 Market Street
Poughkeepsie, New York 12601

Nancy Levine

NANCY LEVINE

Sworn to before me this
7th day of February, 1975.

Patricia H. Havens

NOTARY PUBLIC PATRICIA H. HAVENS
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN DUTCHESS COUNTY
COMMISSION EXPIRES MARCH 30, 1976



THE CITY OF POUGHKEEPSIE
NEW YORK

CORPORATION COUNSEL
(914) 485-4714

MUNICIPAL BUILDING
POUGHKEEPSIE, N. Y. 12602

February 7th, 1975

Clerk of United States Court of Appeals
for the Second Circuit
Foley Square
New York, New York 10007

RE: Francesco Cordaro vs. Richard H. Lusardi and
the United States of America vs. City of
Poughkeepsie
INDEX NO. 74-1347
72 CIV. 3644 (MIG)

Gentlemen:

Enclosed for filing with the Court are twenty-five (25)
copies of the brief of third-party defendant, City of Poughkeepsie,
with regard to the above captioned matter together with the execu-
ted affidavit of service by mail.

Very truly yours,

Jeffrey S. Graham
N.Y.

JEFFREY S. GRAHAM
Assistant Corporation Counsel

JSG:NL
Enclosures

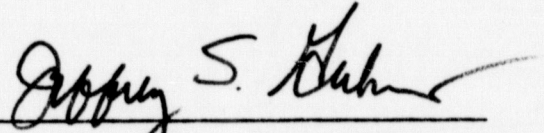
States District Court for the Southern District should be affirmed.

DATED: February 6th, 1975.

Respectfully submitted,

ROBERT B. DIETZ
Corporation Counsel of the
City of Poughkeepsie,

BY:

A handwritten signature in dark ink, appearing to read "Jeffrey S. Graham", is written over a horizontal line.

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